1957

Salt Lake City Lines v. Salt Lake City : Brief of Respondent

Utah Supreme Court

E. R. Christensen; Homer Holmgren; Attorneys for Defendant and Respondent;

CASE NO. 8654

IN THE SUPREME COURT
of the
STATE OF UTAH

SALT LAKE CITY LINES,
Plaintiff and Appellant,

vs.

SALT LAKE CITY,
Defendant and Respondent

BRIEF OF RESPONDENT

E. R. CHRISTENSEN
City Attorney

HOMER HOLMGREN,
Assistant City Attorney
414 City & County Building
Salt Lake City, Utah
Attorneys for Defendant and Respondent

INDEX

CASES CITED

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS AND STATUTES

IN THE SUPREME COURT
of the
STATE OF UTAH

SALT LAKE CITY LINES,
Plaintiff and Appellant,

vs.

SALT LAKE CITY,
Defendant and Respondent

CASE
NO. 8654

BRIEF OF RESPONDENT

STATEMENT OF FACTS

Plaintiff has seen fit to limit its Satement of Facts substantially to the allegations in its complaint. There is no attempt whatever to state the facts appearing in defendant's answer, which are also deemed admitted in this proceeding. We believe it essential to a proper approach to the issues here involved to state the facts revealed by the answer.

Prior to April 25, 1944, the Utah Light and Traction Company held a franchise to operate electric street cars and trolley buses over certain streets in Salt Lake City. On that date the traction company and plaintiff petitioned the city to approve the transfer of the franchise to plaintiff. An ordinance was adopted approving the transfer. It provided that plaintiff had the right to operate "a comprehensive transportation system upon and over the streets of Salt Lake City, including electric cars, electric trolley coaches and *motor buses.*" It further provided for the payment annually of "a license tax of ½ of 1% of the gross passenger revenue derived from operations within the City of electric street cars, trolley coaches and *motor buses.*" The franchise so granted was to run until July 1, 1955 and was accepted by the plaintiff.

The plaintiff, since 1947, has operated only motor buses, but it continued to pay the license tax above referred to until the ordinance was adopted February 27, 1951, the one now under attack. At no time did plaintiff contend that the franchise so granted was unnecessary or became inoperative because it was operating only motor buses, nor did it request cancellation. It did not pay the license tax under protest, nor did it ever assert that the license tax was not uniform or that it was discriminatory. We shall refer to the charge of a percentage of the gross revenue as a license tax for simplification without attempting to define it as such a tax.

When the ordinance of February 27, 1951 was adop-

ted, the plaintiff, through its proper officers, orally consented and agreed to its passage and agreed to increasing the license tax from ½ of 1% to 2% of the gross revenue. This was agreed to and the ordinance passed more than 4 years before the expiration date of the 1944 franchise then in effect.

Plaintiff never at any time questioned the validity of the 1951 ordinance or the tax so increased until this action was brought in 1956. On the contrary, plaintiff has in all respects complied with the ordinance. It has filed with the City Treasurer quarterly reports of gross revenues, together with a computation of the tax to be paid, and co-incidental therewith has paid, without protest, and without questioning the validity of the tax, the amount of the tax thus computed, and plaintiff has permitted access to its records for verification, all as provided for in the ordinance now attacked.

Under date of February 27, 1956, plaintiff petitioned the governing body of Salt Lake City for a hearing to discuss the matter of eliminating the license tax. A hearing was held and a new ordinance was passed amending the 1951 franchise by reducing the license tax from 2% to 1% for the year 1956. A copy of this amending ordinance is attached to the Answer. Neither in its petition, nor in the hearing thereon, did plaintiff assert that the 1951 ordinance was void or that the license tax imposed thereby was invalid. Instead, plaintiff in writing expressed appreciation to the City governing

body for making the reduction, and plaintiff paid the 1% license tax for 1956 without protest or any claim that either the original or amendatory ordinance or license tax was invalid.

Under date of July 15, 1953, plaintiff filed with the Public Service Commission of Utah an application to increase its fares. In such application it listed as an item of expense, to show its need for increasing fares, the license tax payable under the 1951 ordinance. At the hearing on March 10, 1954, this item was discussed and the Commission made inquiry from the City's Mayor whether the City would forego this license tax, stating that it was one of the elements of cost shown in the transportation company's operating cost. The City declined to forego and on March 17, 1954 the plaintiff was granted increases in its fares. In its decision the Civil Service Commission refers to the 2% tax and to wage increases as elements in the expense figure. Plaintiff did not contend before the Public Service Commission that said tax was invalid, but, on the contrary, relied upon such tax as an item of expense it was bound to pay in justification for its application for a raise in fares.

Under the 1951 ordinance, plaintiff is authorized to operate double or single track lines for electric street railway, double or single trolley coach lines, motor buses or any other system of mass transportation, all as it may determine. Consequently, it is free to use whatever type of mass transportation it desires under this fran-

chise.

The City has never regarded the franchise void because of plaintiff's failure to accept it in writing, but has always insisted that the license tax thereunder be paid, except when it voluntarily eliminated ½ in 1956. The city imposes a license fee upon automobiles, taxicabs, auto stages, trucks and other vehicles used for business upon the streets of Salt Lake City but has not required such license fee from plaintiff, and plaintiff has been exempted from all taxes other than the 2% license tax. By the express language of the ordinance that tax is in lieu of all other taxes that the City might impose.

Based upon the foregoing the City alleges that plaintiff has waived all objections to the validity of the ordinance and to the necessity of filing an acceptance thereof and is estopped to claim said ordinance void and to rely on its own wrong and failure in failing to give written acceptance of the ordinance, while, nevertheless, proceeding with its mass transportation business under the ordinance the same as if it had filed formal written acceptance of said ordinance.

STATEMENT OF POINTS

POINT I

THE FAILURE OF PLAINTIFF TO FILE WRITTEN ACCEPTANCE OF THE ORDINANCE OF FEBRUARY 27, 1951, DID NOT RENDER IT NULL AND VOID.

POINT II

THE PLAINTIFF HAS WAIVED ALL OBJECTIONS TO THE VALIDITY OF SAID ORDINANCE AND IS BOUND BY ITS TERMS AND IS ESTOPPED TO QUESTION ITS VALIDITY.

POINT III

BY IMPOSING THE LICENSE TAX UPON PLAINTIFF BUT NOT UPON OTHER TYPES OF MOTOR CONVEYANCES THE ORDINANCE DOES NOT VIOLATE THE RULE AGAINST DISCRIMINATION AND LACK OF UNIFORMITY IN RESPECT TO CLASS AS CONTENDED BY PLAINTIFF.

POINT IV

SALT LAKE CITY HAS POWER TO LEVY THE FRANCHISE TAX IMPOSED BY SAID ORDINANCE.

ARGUMENT

POINT I

THE FAILURE OF PLAINTIFF TO FILE WRITTEN ACCEPTANCE OF THE ORDINANCE OF FEBRUARY 27, 1951, DID NOT RENDER IT NULL AND VOID.

Plaintiff is attempting to convert its failure to file a written consent to the ordinance of February 27, 1951, as the equivalent of a refusal to give such consent. Nowhere is there any inkling that a refusal to accept was ever transmitted to the City, or that the City ever regarded such failure as the equivalent, or that the plaintiff ever regarded such failure as the equivalent, of a refusal to accept. On the contrary both parties proceeded at all times under the theory that the ordinance was valid and that both were controlled in their relationship

with each other by the terms thereof. The reports required by the ordinance were made, the gross receipts given, the tax calculated and paid, and the books and records of the plaintiff were open to the City for checking, all as required by the terms of the ordinance, for six years before this action was commenced. Furthermore, as alleged in the answer, and admitted by plaintiff, plaintiff's officers consented and agreed, orally, to the passage of this very ordinance and to the increase in the license tax from ½ of 1% to 2% of the gross revenue as contained in said ordinance. The franchise, being in the nature of a contract, there would be some doubt as to the power of the City to change its terms without the consent of the plaintiff. So to remove this doubt the matter was discussed with plaintiff's officers. In these discussions plaintiff never did question the validity of the license tax, but orally agreed to the increase, thus clearing the way for the change. In addition, for five years, plaintiff complied with the terms of the ordinance and then petitioned for a reduction in the tax for 1956. It expressed gratitude for such concession. It is apparent, therefore, that there was never any refusal to accept the ordinance; that the lack of a written acceptance was merely an oversight. To now assert that such lack of written acceptance arose from a refusal to accept is an attempt now to create, after the fact, something that had no actuality at the time the ordinance was passed or during the 6 years since its passage before this suit was commenced and is wholly contrary to the attitude manifested by the plaintiff

through its complete compliance with the terms of the ordinance.

The authorities generally hold that a formal written acceptance of the franchise ordinance, even though it contains a provision that it shall be null and void without such acceptance, is not necessary; that the City may waive the written acceptance and acceptance may result from the practical use of the franchise.

12 *McQuillan Municipal Corp. Sec.* 34.43, *Page* 150:

> "Sometimes, however, an ordinance granting a franchise requires the grantee to file his acceptance thereof. But where the grant of a franchise requires an acceptance in writing, the municipality may waive such acceptance, and the act of the company in using the streets may be sufficient as an acceptance."

Postal Tel. Cable Co. vs. City of Newport, 76 S.W. 159, 25 Ky. L. Rep. 635.

Here the ordinance required acceptance in writing within 30 days or the same should be null and void and of no effect. The plaintiff refused to pay the license tax claiming it had not accepted the franchise and was operating under the federal statute governing post roads. The court says:

> "The defendant entered on the streets soon after the ordinance was passed and constructed its system. It had no authority to do so, except under the ordinance. Its acceptance was an acceptance of the ordinance in the absence of some expressed disclaimer, which is not alleged. Its

failure to accept the ordinance in writing might be waived by the city, and this waiver is implied from its acquiescence in the defendant's acts.

"If the defendant was not satisfied with the terms of the grant it could have refused to accept it. . . . The defendant in going ahead under the ordinance also took its chance, and it cannot be heard to say now that the charge was too high."

Postal Tel. Cable Co. vs. City of Newport, 169 S.W. 700.

The same issue was involved here as in the next preceding case. The case was appealed to the Supreme Court of the United States, *Postal Tel. Cable Co. vs. City of Newport,* 247 U.S. 464, 62 Law Ed. 1215, where the court said:

"We assume if the first New York company did at the outset accept the ordinance, either in writing, according to its terms, or by erecting poles and wires and occupying the streets thereunder, or in any other manner satisfactory to the city, that company and its successors in the ownership of the telegraph system, including defendant, are bound to comply with the terms of the ordinance as to the special license tax so long as they continue to retain and enjoy the privileges conferred."

City R Co. vs. Citizens Street R Co., 166 U.S. 557. 41 L. ed. 1114:

"This ordinance is also attacked upon the ground that it was never formally accepted by the company. There is really nothing in this contention. No formal resolution of the acceptance is necessary in any case, if the facts show an actual, practical acceptance by the company, or

action which would be only explicable in case the amendment were accepted. There are two circumstances in this case, either of which is sufficient to constitute an acceptance.

"Mr. Johnson, the manager of the road, who desired the extension of the charter, applied for an amendment making the original section 15 read forty five years instead of thirty years and in that connection says: 'After a good deal of argument I was finally forced to concede to the wishes of the committee, and they recommended to the council an ordinance making it read 'thirty seven years,' instead of the 'forty-five' we applied for. This ordinance was consented to in committee, and afterwards agreed to with the council, as the best we could do under the circumstances.' This was sufficient, as it is universally held that a previous request for an ordinance obviates the necessity of a subsequent acceptance. Atlanta vs. Gate City Gaslight Co. 71 Ga. 106; Illinois River R. Co. vs. Zimmer, 20 Ill. 654; Lincoln & K Bank vs. Richardson, 1 Me. 79 (10 Am. Dec. 34) State, Carlton, vs. Dawson, 22 Ind. 272; Newton vs. Carbery, 5 Cranch, C. C. 632; Perkins vs. Sanders, 56 Miss. 732, 739; 1 Morawetz, Priv. Corp. Sec. 23.

"We are also of opinion that an acceptance may be presumed from the fact that the amendment was beneficial to the corporation."

The authorities also hold, as stated in 6 *McQuillan Municipal Corporations, Sec.* 20.12, *Page* 27:

"One who accepts an ordinance and treats it as in force for a period of years may, under the circumstances, be precluded from challenging its validity."

This is true even though the license granted was ultra vires, though not against public policy. In support of this proposition, we cite the following:

Chicago Gen. Ry. Co. vs. City of Chicago, 176 Ill. 253, 52 N.E. 880.

A suit to collect a mileage tax imposed by the franchise ordinance. The court says:

> "We are also of the opinion that, even though it might be held that the condition upon which the permit or license was granted to the defendant railway company was ultra vires, the city not having the power to impose it, nevertheless, the ordinance having been accepted by the company with the condition attached, agreeing thereby to perform it, it became a valid contract between it and the city, the validity of which the defendant is now estopped to deny. The act of the city in imposing the condition cannot be treated as against public policy or prohibited by statute, and void, and therefore, having accepted the contract in its entirety and enjoyed the benefits for which it agreed to pay the amount prescribed, it cannot now repudiate that contract. Kadish vs. Association, 151 Ill. 531, 38 N.E. 236; Cook Co. vs. City of Chicago, 158 Ill. 524, 42 N.E. 67; City of Fulton vs. Northern Illinois College, 158 Ill., 333, 42 N.E. 138."

City of Springfield vs. Central Union Tel. Co. 184 Ill. App. 400.

The court says:

> "The ordinance having been accepted, neither the grantees nor their assigns may be permitted to repudiate any of the terms and conditions that are not contrary to public policy or prohibited

by statute. Having accepted it became a valid contract in its entirety."

Brattleboro vs. Town of Brattleboro, 173 A. 209, ...Vt.....

The court says:

> "One who accepts an unconstitutional legislative enactment and treats it as in force for years cannot be heard to question its validity. Nor can he challenge such enactment on the ground that it is discriminatory."

POINT II

THE PLAINTIFF HAS WAIVED ALL OBJECTIONS TO THE VALIDITY OF SAID ORDINANCE AND IS BOUND BY ITS TERMS AND IS ESTOPPED TO QUESTION ITS VALIDITY.

The facts as contained in the answer and admitted by plaintiff clearly show that plaintiff has always regarded the ordinance as valid and binding in all its terms. It has complied with and performed all its terms. It has filed with the City Treasurer quarterly reports of gross revenue, together with a computation of the tax to be paid. It has permitted the city to verify such reports by giving access to its books. It has petitioned and accepted a modification of the terms of the franchise ordinance. It has reported to the Public Service Commission that it was bound to pay the license tax and included that license tax as an item of expense in justification for a raise in its fares. The Public Service Commission, at plaintiff's instance, considered the tax as a legal and recurring expense and granted a

raise in fares based upon such expense, which raise is still in effect. The people of Salt Lake City have been paying these increased fares since March 17, 1954 and will continue to pay them indefinitely in the future. By plaintiff's own acts and actions the people of this City have been, and now are, paying these taxes through the medium of paying increased fares. The officers of the plaintiff agreed orally to the increase in the license tax from ½ of 1% to 2%, and upon such agreement the ordinance was adopted, notwithstanding the ordinance then in force still had four years to run. The plaintiff has been operating motor buses exclusively since 1947, but has, nevertheless, complied with the terms of the original ordinance and the ordinance of 1951 and has never at any time asserted that the change to motor transportation or otherwise worked an avoidance of the franchise or authorized it to operate without a franchise.

As stated in *Salt Lake City vs. Utah Light and Traction Company,* 52 Ut. 210, 153 P. 556:

> "Where the controversy has arisen between the contracting parties merely, and in ordinary actions and procedings, the courts have usually compelled compliance with the ordinance treating them as contracts."

Under the conception that this ordinance is a contract which it in legal effect is, it is inconceivable that the plaintiff can now successfully assert, in the face of the facts above stated, that it has not waived the mere formality of filing a written acceptance of the ordinance,

and is not estopped to deny that it has entered into a contract with Salt Lake City governing its right to use the city streets for the prosecution of its business. As stated by the court in the case of *Chicago General Railway Company vs. City of Chicago,* supra.

> "The ordinance having been accepted by the company with the condition attached, agreeing thereby to perform it, it became a valid contract between it and the city, the validity of which the defendant is estopped to deny."

The authorities cited by plaintiff do not involve contracts between the parties involved and the city by the terms of which the parties agreed to pay the city a license tax and so are not in point.

POINT III

BY IMPOSING THE LICENSE TAX UPON PLAINTIFF BUT NOT UPON OTHER TYPES OF MOTOR CONVEYANCES THE ORDINANCE DOES NOT VIOLATE THE RULE AGAINST DISCRIMINATION AND LACK OF UNIFORMITY IN RESPECT TO CLASS AS CONTENDED BY PLAINTIFF.

The rule is stated in *75 A.L.R. Page 26* as follows:

> "With one exception, hereinafter noted (Weimar Storage Co. vs. Dill (1928) 103 N.J. Eq. 307, 143 Atl. 438, infra), the courts which have passed upon the question have uniformly held that motor busses or jitneys operating as common carriers of passengers between fixed termini or over regular routes are the proper subject of a separate classification, and that a state may, without denying the equal protection of the laws, subject such motor busses or jitneys to a tax, and exempt therefrom all other kinds of motor carriers."

We refer the court to the cases there cited and quoted from. Typical of the views expressed by the courts is the following from *Allan vs. Bellingham* 95 Wash. 12, 163 P. 18, involving an ordinance which defines a jitney bus to mean and include "every motor propelled vehicle not operated on tracks, used in the occupation of carrying persons for hire, operating on any street for the purpose of affording a means of transportation along any street similar to that afforded by street railways, by indiscriminately accepting and discharging within the limits of the city such persons as may offer themselves for transportation for hire along the ways or courses on which such vehicle is used or operated, or may be running."

The court says:

> "The record does not disclose the character of the business conducted by the other kinds of common carriers enumerated by the appellant, and, of course, the court has only such knowledge of the matter as is possessed by the generality of mankind. In so far as we are advised, we think there is a wide distinction between the class of business done by jitney busses and that done by the other carriers named. Street cars are so far distinct as to be in a class by themselves, and any regulation applicable to a jitney bus could hardly be applicable to their situation. Auto stages operate on regular schedules between fixed points, usually between one city or town and another. Auto busses and horse carriages ordinarily carry passengers between given points, usually to and from depots, docks or other landings, and hotels. Sightseeing automobiles are operated more in the

nature of private conveyances than as public carriers, and their business bears no relation to the business of a jitney bus. Taxicabs, livery rigs, and the like operate from fixed stands and are put into use on hire. The jitney bus differs from each of these. It is operated continuously upon the streets, usually in the most congested parts, soliciting and taking up passengers wherever they can be found. It is never for hire at all; all that is offered is a seat and an opportunity to ride to some point within the limit of its operations. Its unrestricted use is fraught with danger, not only to the passenger it carries, but to others using the streets for their own purposes. Being a common carrier, it is a subject of regulation, and we are constrained to believe that its business is such as to make it subject of separate classification. This being true, the city council of a municipality may lawfully exact regulations applicable to its business which it does not make applicable to the business of other common carriers, without violating either of the constitutional provisions before cited.

"Municipal ordinances regulating the jitney traffic as a class apart from other common carriers have been enacted in many of the principal cities of our sister states. These, in so far as we are advised, have been uniformly upheld by the highest courts of such states against attacks on the ground that they violated the equal protection and due process of law clauses in the Federal Constitution, and the provisions directed against class legislation in the Constitution of the individual states. Some of the cases are the following: City of Memphis vs. State ex rel. Ryals, 133 Tenn. 83, 179 S.W. 631, L.R.A. 1916B, 1151; Ex parte Bogle (Tex. Cr. R.) 179 S.W. 1193;

Huston vs. City of Des Moines (Iowa) 156 N.W. 883; Ex Parte Dickey (W. Va.) 85 S.E. 781, L.R.A. 1915F, 840; Thielke vs. Albee, 79 Or. 48, 153 Pac. 793; Ex parte Cardinal, 170 Cal. 519, 150 Pac. 348, L.R.A. 1915F, 850; Hazelton vs. City of Atlanta, 144 Ga. 775, 87 S.E. 1043; Auto Transit Co. vs. Forth Worth (Tex. Civ. App.) 182 S.W. 685."

This case is referred to in *Texas Co. vs. Cohn,* 112 P. 2d 522 as follows:

"In Allen vs. Bellingham, the validity of an ordinance of the city of Bellingham, which placed a license, or occupation tax, upon the owners of jitney busses, was challenged. This court held that the ordinance did not violate the Federal or State Constitutions, although operators of auto stages, sight-seeing automobiles, taxicabs, and street cars, manifestly in competition with jitney busses, were not subject to the tax."

Dickey vs. Davis 76 W. Va. 576, 85 S.E. 781, L.R.A. 1915 F. 840.

"* * * But, as regards unusual and extraordinary rights respecting public properties, its power of control and regulation is much more extensive. Such rights are in the nature of concessions by the public, wherefore the legislature may give or withhold them at its pleasure. It may give them for some purposes and withhold them for others, and in the case of those given, it may, upon considerations of character, quality, and circumstances, discriminate, permitting some things of a general class or nature to be done and refusing to permit others of the same general class to be done, or extending the privilege to some persons

and denying it to others because of differences of character or capacity.

"The right of a citizen to travel upon the highway and transport his property thereon in the ordinary course of life and business, differs radically and obviously from that of one who makes the highway his place of business and uses it for private gain, in the running of a stage coach or omnibus. The former is the usual and ordinary right of a citizen,—a common right, a right common to all; while the latter is special, unusual and extraordinary. As to the former, the extent of legislative power is that of regulation; but, as to the latter, its power is broader; the right may be wholly denied, or it may be permitted to some and denied to others, because of its extraordinary nature. This distinction, elementary and fundamental in character, is recognized by all the authorities."

See also 75 *A.L.R. Page* 30 where it is said:

"And the fact that taxicabs are exempted from or not subject to a tax imposed upon jitneys or motor buses operating over regular routes or between fixed termini, or on a plan similar to that followed by street railways, does not render the tax unconstitutionally discriminatory, since the classification is a reasonable one."

See also *Frick vs. City of Gary*, 135 N.E. 346, 192 Ill. 76; *Jackie Cab Co., et al, vs. Chicago Park District* 9 N.E. 2d 213, 366 Ill. 474; *Tuggle vs. Parker*, 156 P. 2d 533, 159 Kan. 572; *Central Greyhound Lines vs. Greyhound Cab Corp.* 81 N.Y.S. 2d 416; *Jarrell vs. Orlando Transit Co.*, 167 So. 664, 123 Fla. 776; *Postal*

Tel. Cable Co. vs. City of Newport, supra; State vs. Black Hills Trans. Co. 20 N.W. 2d 683, ... S.D. .....

In *Slater vs. Salt Lake City,* 115 Ut. 476, 206 P. 2d 153, 9 AL.R. 2d 712, this court stated the fundamental principles now under discussion as follows:

> "Discrimination is the essence of classification and does violence to the constitution only when the basis upon which it is founded is unreasonable. In fixing the limits of the class, the legislative body has a wide discretion and this court may not concern itself with the wisdom or policy of the law. Our function is to determine whether an enactment operated equally upon all persons similarly situated. If it does then the discrimination is within permissable legislative limits. If it does not, then the differentials would be without reasonable basis and the act does meet the test of constitutionality."

As stated in *Dickey vs. Davis, supra,* that the plaintiff "has no natural right to maintain upon a public highway a vehicle for the carriage of passengers for hire is unquestionable." Further, it is clear that the city violates no rule of uniformity, or of unfair discrimination, in requiring of plaintiff conditions including the payment of the 2% of its gross revenue, for permission to use its streets, not required of other types of transporters of passengers.

Plaintiff's buses are designed to accommodate mass transportation. The wear and tear on the streets by such vehicles making many runs per day over fixed routes

is heavy. By the terms of the ordinance plaintiff has the right to maintain coach stop signs upon the street signs maintained by the city. Also the city furnishes sand and salt for use by the plaintiff when water, snow or ice impairs the normal traction. Further the plaintiff is permitted to maintain benches on the street for the accommodation of its customers. Special loading and unloading places are provided and traffic generally is directed away from the same so as to not interfere with plaintiff's operations. These special incidents to the use of the streets are not afforded to the public, nor to other carriers of passengers. Clearly plaintiff is in a class which entitles the city to legislate as to it without being guilty of class legislation or unfair discrimination.

POINT IV

SALT LAKE CITY HAS POWER TO LEVY THE FRANCHISE TAX IMPOSED BY SAID ORDINANCE.

While the statutes do not expressly grant to the City the power to grant a franchise for the operation of a mass transportation system over its streets within its boundaries, similar to the transportation provided by a street railway system, they do give the city plenary power over its streets. Section 10-8-8, U.C.A. 1953, empowers the city to "lay out, establish, open, alter, widen, narrow, extend, grade, pave or otherwise improve streets, alleys, avenues, boulevards . . . . and may vacate the same or parts thereof by ordinance." Section 10-8-11, U.C.A. 1953 provides that it "may regulate the use of

streets, alleys, avenues . . ." Section 10-8-39 empowers a city to license, tax and regulate stages and buses, etc. Section 10-8-80 authorizes the levying of a license tax or fee upon any business for revenue.

As stated in *Schoenfield vs. City of Seattle,* 265 F. 726:

> "The plaintiff purposes to utilize public streets of a city for a special purpose and private gain, a right not common to all. As to such the Washington court, in Allan vs. Bellingham (supra) said: 'The power of the city as to such users of the streets is entirely plenary.'"

In *Consolidated Coach Corp. vs. Kentucky River Coach Co.,* 249 Ky. 65, 60 S.W. 2d 127, the court said:

> "The streets and highways belong to the public. They are built and maintained at public expense for the use of the general public in the ordinary and customary manner. The state, and the city as an arm of the state, has absolute control of the streets in the interest of the public. No Private individual or corporation has a right to use of the streets in the prosecution of the business of a common carrier for private gain without the consent of the state, nor except upon the terms and conditions prescribed by the state or municipality, as the case may be."

Under a statute authorizing ordinances for the general welfare and proper government of the city the court, in *Clem vs. LaGrange* 149 S.E. 638, 169 Ga. 51, 65 A.L.R. 1361, stated:

> "Individuals do not have the inherent right

> to conduct their private businesses in the streets of a city. A city can prohibit the owners or operators of taxicabs and busses from transporting passengers for hire in such vehicles upon the streets of the city. The transportation of passengers for hire in such vehicles or otherwise is a privilege which the municipality can grant or withhold. As the owners or operators of taxicabs or jitney busses have no right to transport passengers for hire on the streets of the city, and as the city can prohibit wholly or partially the conduct of such business in its streets, if the city sees fit to grant permission to individuals to conduct such business in its streets, it can prescribe such terms and conditions as it may see fit, and individuals desiring to avail themselves of such permission must comply with such terms and conditions, whether they are reasonable or unreasonable. Schlesinger vs. Atlanta, 161 Ga. 148, 129 S.E. 861."

Payne vs. Jackson City Lines, 220 Miss. 180, 70 So. 2d 520 involved transportation by motor bus. The court said:

> "The streets and highways, built and maintained at public expense, belong to the public, and no private individual or corporation has a right to use them for commercial purposes for private gain without the consent of the state of municipality involved."

We quote the following from *Suldreth vs. City of Charlotte,* 27 S.E. 2d 650, 223 N.C. 629:

> "The business of carrying passengers for hire is a privilege, the licensing of which is peculiarly and exclusively a legislative preprogative. So is

the power to regulate the use of public roads and streets.

"Generally, under the powers conferred upon them by their charters, or by general statute, municipal corporations may impose reasonable conditions upon the use of the streets by jitneys, taxicabs, motor busses, or other motor vehicles operating as common carriers in the transportation of passengers or freight. (Blashfield Auto. Law & Proc. Perm Ed. p. 81, Sec. 105, see note 19 for authorities.)

"This power exists not only under the licensing authority of the municipality but also under its recognized power to regulate the use of its streets in the interest of public safety and convenience, and it is generally held that a municipality in the exercise of this power may prohibit the use of the streets for private business or other purpose detrimental to the common good. 3 McQuillan Mun. Corp. (2d) Revised, 216, Sec. 989; State vs. Caster, supra; Blashfield Cyc. Auto. Law & Prac. Perm. Ed. Sec. 78, p. 67; City of New Orleans vs. Calamari, 150 La. 739, 91 So. 172, 22 A.L.R. 106; Henderson vs. Bluefield, 98 W. Va. 640, 127 S.E. 492, 42 A.L.R. 279, Anno. p. 282.

"It was never contemplated that the highways should form a part of the capital stock of common carriers engaged in the transportation of persons or property for profit, or that the use of the highways should be donated to them for that purpose.

"Clearly, these companies have no vested or inherent right in the highways, and their unrestrained use thereof is equivalent to an appropri-

ation of public property for private use, and it is within the power of the Legislature to prohibit this use or to prescribe the terms upon which it may be exercised.

"Where the power to regulate, license and control motor vehicles for hire is vested by the Legislature in the City Council, there is a broad presumption in favor of the validity of an ordinance undertaking to exercise such power, and he who attacks it must show affirmatively that it is not expressly authorized by statute or that it is, as applied to him, unreasonable and oppressive.

"The municipality may name such terms and conditions as it sees fit to impose for the privilege of transacting such business, and the courts cannot hold such terms unreasonable except for discrimination between persons in a like situation."

This court in *Slater vs. Salt Lake City,* 115 Ut. 476, 206 P. 2d 153, 9 A.L.R. 2d 712, quoted this language from Ex parte Mares, 75 Cal. App 2d 798, 171 P. 2d 762:

" 'The place for the conduct of a private business is upon private property; and it has been said that there is no vested right to do business upon the public streets.' Pittsford vs. City of Los Angeles, 50 Cal. App 2d 25, 32, 122 P 2d 535, 538, and see text therein quoted and cases cited. 'It is well established law that the highways of the state are public property; . . . and that their use for purposes of gain is special and extraordinary, which, generally, at least, the legislature may prohibit or condition as it sees fit (citations).' Stephenson vs. Binford, 287 U.S. 251, 264,

> 53 S Ct 181, 184, 77 L ed 288, 294, 87 ALR 721. 'Use of a public street for private enterprise may under some circumstances rebound to the public good; but nevertheless it is a special privilege peculiarly subject to regulation, and one which may be granted on reasonable terms or entirely withheld (citations).' People vs. Galena, 24 Cal App Supp 2d 770, 775, 70 P 2d 724, 727 . . . Numerous authorities support these statements.' "

The court also quoted from *Packard vs. Banton,* 264 U.S. 140, 68 L ed 596, as follows:

> "If the state determines that the use of streets for private purposes in the usual and ordinary manner shall be preferred over their use by common carriers for hire, there is nothing in the Fourteenth Amendment to prevent. The streets belong to the public and are primarily for the use of the public in the ordinary way. Their use for the purposes of gain is special and extraordinary, and, generally at least, may be prohibited or conditioned as the Legislature deems proper . . . ."

The case of *Pine Bluff vs. Arkansas Traveler Bus Co.,* 171 Ark. 727, 285 S.W. 375, stated the rule as follows:

> "The right of a citizen to travel upon the streets and transport his property thereon in the ordinary course of things is wholly different from that of a common carrier, who makes the streets his place of business and uses them for private gain in the running of motor busses. The former is the common right of everyone, and the latter is a special or exceptional use of the streets, not common to all citizens of the state."

We contend that under the statutes above quoted and the rule of law enunciated by the foregoing cases the city has the power to impose special terms upon all persons using its streets for the business of common carrier, and that such terms may be evidenced by and form a franchise ordinance adopted by the city.

Section 54-2-1 (12) defines the term "automobile corporation" as including every corporation and person engaged in or transacting a business of transporting passengers by means of automobiles or motor stages on public streets. Subsection 14 defines a common carrier as including an automobile corporation. Section 54-4-25 (1) requires every automobile corporation to obtain a certificate from the Public Service Commission. Subsection (3) provides that every applicant for such a certificate shall file satisfactory evidence to show that such applicant has received the required consent, franchise or permit of the proper county, city, municipal or other public authority.

This court in *Union Pacific R. Co. vs. Public Service Commission,* 103 Ut. 186, 134 P 2d 469 refers to Section 54-4-25 (3), and holds that a railroad could not occupy any streets of a city without the consent of the city and that such consent was required under the Public Utilities Act.

In *People vs. Public Service Commission,* 174 N.E. 637, 255 N.Y. 232, the act required the applicant for a certificate to show that it had "received the required

consent of the proper municipal authorities." The court said:

> "Under this statute a consent presently operative that the petitioner occupy the highway is a condition precedent to a certificate of approval."

In *Sylvania Buses vs. City of Toledo,* 160 N.E. 674, 118 Ohio St. 187, the plaintiff obtained certificates from the Public Utilities Commission in 1923. In 1925 the Utilities Law was amended requiring motor transportation companies to obtain consent of the municipal corporation. The City of Toledo, by ordinance, prohibited the transportation of passengers over routes served by a traction company and required a permit from the city to transport passengers for hire. The city threatened to enforce the ordinance and plaintiff sued to enjoin the city from interfering with the operation of its motor buses. The court held the certificates held by plaintiff did not constitute a franchise nor a contract. "A permission granted by the certificate to operate upon the public highways could not invest plaintiff in error with the right to use the public streets for his private business." It was only a license and could be revoked.

From the foregoing it is apparent that the Legislature, in enacting the Public Utilities Act, did not intend to take away any of the powers otherwise granted to cities to control the use of their streets. On the contrary, such control was specifically recognized and the Act made subject thereto.

Plaintiff cites *Utah Light and Traction Company vs.*

Public Service Commission, 118 P 2d 683, 101 Utah 99 as being conclusive that the city had no power to require a franchise of the plaintiff and to impose conditions therein not applicable to other users of the streets. An analysis of that case shows the following: The Utah Light and Traction Company, which had a franchise from Salt Lake City to operate a mass transportation system over the city's streets, protested before the Public Utilities Commission the application of "Airways" for a certificate to "render service as a common carrier of passengers between Salt Lake City and some 9 smaller communities in the south end of Salt Lake City," a wholly interurban operation. The question of operating a bus system within Salt Lake City, Wholly intraurban was not involved. The Traction Company raised the objection that "Airways" had not shown it had the consent of the county, municipal or city authorities. Contrary to what counsel states in his brief, page 20, ("it ("Airways") had no franchise from Salt Lake City to conduct that portion of its operation which was conducted within Salt Lake City,") the court states:

> "The evidence showed that Airways had a franchise in Salt Lake City where it had some local intracity routes; that it had consent and permission of Murray City . . . and it had made arrangements for all necessary franchises in all towns where it proposed to operate."

There was no evidence or contention that Airways was going to operate an intracity system in any of the communities named. As to Salt Lake City it already had

such a franchise. It was seeking a certificate to operate an intercity line, from 9 communities to Salt Lake City, something wholly different from an intracity mass transportation system over designated streets, or fixed routes and termini, taking on passengers anywhere it desired along such routes.

While the court uses language, as quoted in plaintiff's brief, which seems to limit the city's power to require franchises, we earnestly submit that such language is not only not decisive of the question here involved; but as to such question, if it has any applicability at all, is wholly dictum. The essence of the court's decision was that "there is no power granted to require or grant a franchise for the use of the streets and highways for the purpose of travel thereon as used by the public generally . . . it (Airways) uses the streets only for the purpose of travel and transport in the same manner as the public generally. It is a business not subject to franchise requirements."

With such conclusion we do not disagree. In bringing its passengers into Salt Lake City, Airways would be operating the same as a farmer or tradesman in bringing his products or goods into the city. The streets would not be a part of its capital or its place of business, as is the case with plaintiff.

The essence and real effect of the decision in this case is stated in *Union Pacific R. Co. vs. Public Service Commission, supra,* as follows:

"In Utah Light & Traction Co. vs. Public Service Commission, 101 Utah 99, 118 P. 2d 683, 689, we defined the term 'franchise' 'as * * * the privilege of doing that which does not belong to the citizens generally by a common right'; and we pointed out that the right to lay rail is a special privilege within the purview of that definition and therefore a proper subject of grant by franchise. We added that franchises '* * * are required only in cases in which it is sought to impose upon the street a special burden which cannot be imposed generally, that is, to burden the street with a special privilege which the public generally may not likewise enjoy.' We concluded, that since the application in that case was by an automobile corporation for the operation through certain cities as a common carrier by automobile, and since automobiles do not burden cities with rails or otherwise in a special manner, but only in the same manner as the public generally, that the applicant was not subject to franchise requirements. In other words, cities and towns have the power conferred upon them to grant franchises for the use of their streets where such use necessitates the burdening of the street for the duration of the franchise with some physical instrumentality such as railway tracks or trolley poles, as distinguished from a general power to control the use of their streets where such use is merely such as is enjoyed by the public in common. Certainly, in the case last cited, this court recognized the power of cities to grant franchises, within the scope of the definition of that term therein contained, and did not regard that power as repealed by the Public Utilities Act, or otherwise."

That streets can be burdened by a special use, not open to the public generally, without putting some kind of a structure on them, such as poles, wires, rails, etc., is abundantly clear from the authorities heretofore cited. It is also clear, from the language of these two Utah cases, that where the use of the streets is special the city has the right to require a franchise.

In *Shortino vs. Salt Lake and U. R. Co.* 174 P. 860, 52 Ut. 476, it was contended that the town of Salem did not have power by ordinance to fix a speed limit governing cars of an interurban railroad. *Article* 12, *Section* 8 of the *Utah Constitution* is quoted as follows:

> "No law shall be passed granting the right to construct and operate a street railroad, telegraph, telephone or electric light plant within any city or incorporated town, without the consent of the local authorities who have control of the street or highway proposed to be occupied for such purposes."

The court says:

> "If it were held, however, that the foregoing provision did not apply to defendant's interurban railroad, yet the authorities of the town of Salem clearly had the right to grant or withhold the right to the use of the streets in the town, and thus to impose conditions respecting the use thereof for purposes other than the right of ordinary travel thereon."

In the case of *Lewis vs. Utah State Tax Commission,* 218 P. 2d 1074, 118 Ut. 72, this court had occasion to review the cases in which the term "street railway" or

"street railroad" was involved. It was there pointed out that this term may have a different connotation in various statutes, depending on the purpose to be accomplished. It is there pointed out that a street railway may be considered as not only a rail bound system but also a non rail bound street transportation system, and so those words could be descriptive of a street transportation system without rails.

We contend that the provisions of the constitution quoted in the Shortino case, supra, should be so construed as to include under the term street railroad, any mass transportation system which performs the same function as a street railroad and uses the streets for that purpose. That provision was drawn when motor buses were unknown. The framers used the term then applicable to a mass street transportation system. It is inconceivable that they intended that consent of the city should be obtained if the streets are to be used by one kind of system but would not be required if some other system should come into use to replace the then known system.

The case of *Peoples Transit Co. vs. Louisville Ry. Co.* 295 S.W. 1055, 220 Ky. 728, discusses this very question. Here the street railway company sought to enjoin a bus line from operating on the city streets of Louisville without a franchise. One of the constitutional provisions involved was similar to ours, using the words "street railway." The court argued that such words should be interpreted in the light of the services rendered,

rather than upon the type of means used to render the same, and so should be interpreted to mean a motor bus type of transportation system. It was not necessary to decide the case on that point, however, as the court held that the "use of motor vehicles on public streets and highways for the transportation of passengers between fixed termini, etc., is the exercise of a franchise, there can be no doubt." It defines a franchise as "a privilege of doing that which does not belong to the citizen of the country by common right." The court then says:

> "Cases from the highest courts of 23 states besides Kentucky are cited in briefs, wherein it was held that one engaged in the operation of the business of a common carrier upon the public highways by motor power and between fixed termini was exercising an extraordinary privilege in the use of the traversed highways amounting to a franchise, and in our opinion in the Harrison Case, supra, will be found others by the Supreme Court of the United States to the same effect. There is, therefore, no room for the contention that defendant, while engaged in the operation of its busses over the streets of Louisville in the manner hereinbefore pointed out was not doing so in the exercise of such a franchise as was and is contemplated by Section 164, supra, of our constitution."

We submit that, under the power to regulate the use of its streets, and under its power to license and tax any business for revenue purposes, the City has the right to require that plaintiff, in operating its mass

transportation system over the city streets, obtain its consent in the form of the franchise here involved, and to impose a charge of 2% of plaintiff's gross revenue in lieu of all taxes, levies and license taxes which might otherwise be imposed, such charge being limited to the gross revenue derived by plaintiff within the limits of Salt Lake City.

CONCLUSION

In 1944 plaintiff sought for and obtained a franchise from Salt Lake City to operate a mass transportation system for carrying passengers over the streets of the city, by taking over the franchise then existing in favor of the Utah Light and Traction Company. Under that franchise it could operate either electric street cars, electric trolley coaches or motor buses. Under the franchise of February 27, 1951, the one under attack, it still can operate the same kind of system. Since 1947, a period of nine (9) years, plaintiff has fully recognized and has acquiesed in, the city's power to grant a franchise to operate a motor bus transportation system over its streets by complying with the terms of both franchises. It agreed orally to increasing the charge to 2% of it gross revenue as contained in the ordinance and it has sought an increase in fares on the basis of such charge. It has accepted the benefits of both franchises. It cannot now question the validity of either. Plaintiff is in a class by itself such as permits placing conditions upon it not imposed upon other users of the streets.

The franchise charge is some compensation to the public for the extraordinary use which plaintiff makes of the public streets in conducting its business thereon. Plaintiff is thereby assisting, to some extent at least, in the public burden of maintaining the streets. We respectfully submit that the franchise ordinance is valid and that the city has the power to require payment to it of the 2% gross revenue which plaintiff agreed to pay. Judgment of the lower court should be affirmed.

Respectfully submitted,

E. R. CHRISTENSEN
City Attorney
HOMER HOLMGREN,
Assistant City Attorney
414 City & County Building
Salt Lake City, Utah
Attorneys for Defendant and Respondent